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2 United States Bankruptcy Judge
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5 **March 21, 2007**

6 MARK L. HATCHER
7 CLERK U.S. BANKRUPTCY COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA
10 _____DEPUTY

11 **UNITED STATES BANKRUPTCY COURT**
12 **WESTERN DISTRICT OF WASHINGTON AT TACOMA**

13 In re:

14 MICHAEL L. CANTON,

15 Debtor.

Case No. 05-47803

MEMORANDUM DECISION

NOT FOR PUBLICATION

16 This matter came for hearing on March 6, 2007, on the Chapter 7 Trustee's (Trustee)
17 Motion to Sell and Compromise Claim Pursuant to 11 U.S.C. 363(f) and Bankruptcy Rule
18 91019, regarding all legal claims that Michael Canton (Debtor) and the Debtor's marital
19 community have against Jeffery L. Miller Architect, P.C., James Frank Construction, Inc., and
20 other persons that arise out of or relate to the transactions, occurrences, facts or events
21 alleged in Greg Atkeson v. James Frank Construction, Inc., et. al., case no. 05-2-05766, Clark
22 County Superior Court (State Court Lawsuit). The Trustee has accepted the bid of Greg
23 Atkeson (Atkeson) for \$121,000 cash, subject to Court approval. The Debtor has consented
24 to the sale. Jeffery L. Miller Architect, P.C., a bidder in the sale, has filed a Notice of
25 Discontinuance of Further Appearances Regarding the Trustee's Motion. James Frank

1 Construction, Inc., (James Frank), a non-creditor and unsuccessful bidder, has filed the only
2 objection to the Trustee's Motion.

3 The initial issue before the Court is whether James Frank, a non-creditor, has standing
4 to object to the sale. James Frank indicates that 11 U.S.C. § 1109(b), which addresses a
5 party in interest's right to be heard in a Chapter 11 case, constitutes grounds to object to the
6 sale. James Frank, however, does not provide authority holding that this statute applies in
7 Chapter 7 cases, but rather concedes that this statute is only "instructive" outside Chapter 11.
8 See In re Lewis, 273 B.R. 739, 743 (Bankr. N.D. Ga. 2001) (the bankruptcy court recognized
9 that 11 U.S.C. § 1109(b) is confined to Chapter 11 but can provide guidance in Chapter 7).
10 Even if this statute applies, § 1109(b) remains subject to generally applicable principles of
11 standing. See 7 L. King, Collier on Bankruptcy ¶1109.01[3], p. 1109-6, ¶1109.04[4], p. 1109-
12 39 (15th ed. rev. 2006). Thus, James Frank must establish standing independent of §
13 1109(b).
14

15 In the bankruptcy context, the Ninth Circuit has adopted an additional requirement for
16 establishing standing: "[t]he appellant must be a 'person aggrieved' by the bankruptcy court's
17 order." Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.), 177 F.3d 774, 777
18 (9th Cir. 1999). This standing requirement, however, appears to apply only in determining
19 whether a person has standing to appeal a bankruptcy court's order. In this case, the Court is
20 concerned only with standing at the bankruptcy court level and under the facts of this case.
21

22 "There are numerous authorities which hold that a non-creditor, whose only connection
23 with a bankruptcy case is that the party was an unsuccessful bidder at a bankruptcy sale,
24 lacks standing to challenge the right of other bidders to consummate the sale." In re Gulf
25 States Steel, Inc. of Alabama, 285 B.R. 739, 742 (Bankr. N.D. Ala. 2002) (citing several circuit

1 court cases recognizing that a competing bidder generally lacks standing to challenge a sale).
2 Courts have observed that bidders are not within the “zone of interests intended to be
3 protected” under bankruptcy law. In re Gulf States Steel, 285 B.R. at 742 (quoting In re HST
4 Gathering Co., 125 B.R. 466, 468 (Bankr. W.D. Tex. 1991)).

5 This rule, however, is not absolute. “[W]hen an unsuccessful bidder attacks a
6 bankruptcy sale on equitable grounds related to the intrinsic structure of the sale, he brings
7 himself within the zone of interests which the Bankruptcy Act seeks to protect and to
8 regulate.” The Wine Group v. Diamante (In re Hat), 310 B.R. 752, 758 (Bankr. E.D. Cal.
9 2004) (quoting Kabro Assocs. v. Colony Hill Assocs. (In re Colony Hill Assocs.), 111 F.3d 269,
10 274 (2nd Cir. 1997)). Thus, an “unsuccessful bidder is ‘aggrieved’ if ‘the sale was either
11 fraudulent or unfair’ and property was sold for an improperly low price.” In re Colony Hill, 111
12 F.3d at 274 (quoting Zaccaro v. Bowery Savs. Bank (In re Jewel Terrace Corp.), 10 B.R.
13 1008, 1012 (Bankr. E.D. N.Y. 1981)). An unsuccessful bidder, however, must present “some
14 evidence of fraud, deceit, mistake of fact or other inequitable overreaching.” In re Colony Hill,
15 111 F.3d at 274 (quoting In re REA Holding Corp., 447 F. Supp. 167, 169 (S.D.N.Y. 1978)).

16
17 In this case, James Frank makes broad assertions of procedural irregularities in the
18 Trustee’s auction, including fraud and collusion, but provides no evidence supporting these
19 assertions. Without even a minimal showing, the Court concludes that further review of any
20 alleged irregularities is not warranted and that James Frank has not established standing.

21
22 Notwithstanding the above, even if the Court were to find irregularities so as to confer
23 standing on James Frank for purposes of challenging the Trustee sale, the Court would still
24 confirm the sale based on its obligation to take into consideration the following three factors:
25 (1) integrity of the trustee’s sale; (2) the 11 U.S.C. § 363(i) rights (related to a co-owner of

1 property); and (3) the preservation of the best interests of the estate. In re Fehl, 19 B.R. 310,
2 311-312 (Bankr. N.D. Cal. 1982).

3 First, regarding the integrity of the Trustee sale (auction), the evidence establishes that
4 notice of the auction and terms of the auction were served on all parties of interest, those
5 requesting special notices, and the State Court Lawsuit litigants, in accordance with Fed. R.
6 Bankr. P. 2002(a), 6004(a), and 9019(a). James Frank does not allege to the contrary. As
7 the Trustee provides, the objecting parties in this case—each represented by legal counsel—
8 participated in each of the court hearings in this case, briefed issues related to the Trustee's
9 motion and notices for the past several months, and fully participated in the auction. There is
10 no evidence to suggest that the procedure leading up to and during the auction was irregular.

12 Moreover, there is no evidence to support James Frank's allegation that the Trustee
13 acted in collusion with Atkeson, or in any way fraudulently, during the bidding process. When
14 directly asked to provide evidence in support of such allegations, James Frank was unable, or
15 unwilling, to do so. In contrast, the Trustee represented to the Court that he conducted his
16 duties consistent with the applicable statute and case law in order to secure the best outcome
17 for the creditors. The Court does not conclude otherwise.

18 Additionally, contrary to James Frank's assertion, there is no evidence that the Trustee
19 failed to assess the validity of Atkeson's \$1.5 million proof of claim. Rather, the Trustee's
20 affidavit specifically states that prior to the auction, the Trustee reviewed submissions of the
21 bidding parties regarding the validity of Atkeson's proof of claim. The Trustee determined that
22 that there existed a basis both for the claim and for an objection to the claim; thus, extensive
23 litigation ultimately would be necessary to resolve the claim's validity. There is no evidence to
24 the contrary.
25

1 James Frank also appears to allege irregularity because the successful bid contains a
2 provision allowing Atkeson to voluntarily withdraw his \$1.5 million proof of claim without any
3 res judicata or other binding effect on it, here or in state court. James Frank relies on Quincy
4 Mall, Inc. v. Parisian, Inc. 27 Fed. Appx. 631 (7th Cir. 2001), to support the proposition that
5 voluntary withdrawal of a proof of claim acts as a judgment on the merits. James Frank's
6 reliance on this case is misplaced. First, Quincy Mall is unpublished opinion, and prior to Fed.
7 R. App. P. 32, which permits citation to unpublished cases issued on or after January 1, 2007,
8 this Court is unaware of any authority for a party to cite to an unpublished decision in this
9 circuit. Second, in Quincy Mall, the bankruptcy court ruled that the claimant would be
10 permitted to withdraw its claim only if it agreed to have the claim treated as though it had been
11 fully adjudicated on the merits. Quincy Mall, 27 Fed. Appx. at 636 n.8. There is nothing in
12 this case, or any published case that the Court could find, holding that the voluntary
13 withdrawal of a proof of claim acts as a judgment on the merits. Consequently, because there
14 is no legal authority granting res judicata effect to Atkeson's proof of claim, there is nothing
15 irregular about including this provision in the Trustee's Proposed Order Allowing Trustee to
16 Sell and Compromise Claim Pursuant to 11 U.S.C. 363(f) and Bankruptcy 9019 (Proposed
17 Order).
18

19 The second Fehl factor would not apply and will not be considered by the Court. See
20 In re Alves, 52 B.R. 353, 355 (Bankr. D. R.I. 1985) (where in a § 363 sale without a co-owner,
21 the court adopted two of the three Fehl factors in determining whether to approve a trustee's
22 proposed sale of property of the estate).
23

24 Regarding the third Fehl factor—preservation of the best interests of the estate—the
25 Trustee's affidavit supports the conclusion that the creditors are best served by the Trustee's

1 decision. "The court's obligation in § 363(b) sales is to assure that optimal value is realized by
2 the estate under the circumstances." Simantob v. Claims Prosecutor, LLC (In re Lahijani),
3 325 B.R. 282, 288 (9th Cir. BAP 2005). The claims in this case total \$101,000, excluding
4 Atkeson's claim of \$1.5 million. The accepted bid of \$121,000 cash will likely pay 100% of all
5 the claims as well as all administrative expense claims. It will eliminate any need for claim
6 litigation and consequently allow creditors to be paid sooner than if claim litigation, and
7 subsequent appeals, proceeded in the federal courts. In addition, the Trustee determined that
8 Atkeson's bid was superior because the competing bid contains a clause that would require
9 the Trustee to abandon his fiduciary duties: upon litigation of Atkeson's claim, the Trustee
10 would be prohibited from seeking resolution of the claim, even if in the creditors' best interest.
11 For the reasons set forth above, the sale to Atkeson is approved.
12

13 James Frank also objects to the Trustee's Proposed Order. James Frank first objects
14 to paragraph five of the Trustee's Proposed Order, which grants Atkeson retroactive relief
15 from automatic stay to continue the State Court Lawsuit and to allow the assignments of
16 claims and causes of actions from the Debtor and Megan Canton to Atkeson. This objection
17 appears to be based on James Frank's allegations of collusion and fraud. The Court has
18 already considered and rejected these unsubstantiated allegations. 11 U.S.C. § 362 "gives
19 the bankruptcy court wide latitude in crafting relief from the automatic stay, including the
20 power to grant retroactive relief from the stay." Schwartz v. United States (In re Schwartz),
21 954 F.2d 569, 572 (9th Cir. 1992). Nonetheless, retroactive annulment should be "applied
22 only in extreme circumstances." Phoenix Bond & Indem. Co. v. Shamblin (In re Shamblin),
23 890 F.2d 123, 126 (9th Cir. 1989).
24
25

1 Based on the "Terms of Best Bid" as set forth in the Trustee's Motion to Sell and
2 Compromise, the sale and compromise are still effective even if the Court does not grant the
3 requested retroactive relief. The Court declines to address retroactive relief from stay at this
4 time, as it does not appear that this requested relief was properly noticed. The Court will
5 address this issue only if and when Atkeson moves for such relief, which may be done on
6 shortened time.

7 James Frank also objects to paragraph four of the Trustee's Proposed Order, which
8 allows Atkeson to withdraw his \$1.5 million proof of claim without any res judicata, collateral
9 estoppel, or former adjudication effect. The Court has already considered and rejected this
10 objection in its analysis of the integrity of the sale.

11 There has been no objection to the Trustee's Motion to Compromise Claim.
12 Nonetheless, the Court has applied the appropriate review of the compromise of the Debtor's
13 potential claim against Jeffery L. Miller Architect, P.C. and James Frank, and concludes that
14 the bid for \$121,000 cash is fair and equitable. See Woodson v. Fireman's Fund Ins. Co. (In
15 re Woodson), 839 F.2d 610, 620 (9th Cir. 1988) (where court sets forth four factors a court
16 must consider in passing on a proposed compromise).
17

18 There has been no objection to the Trustee's Motion to Shorten Time, and it is hereby
19 granted. The Trustee's Motion to Sell and Compromise Claim is also hereby granted.
20

21 DATED: March 21, 2007



Paul B. Snyder
U.S. Bankruptcy Judge